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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 256

RD-DR CORPORATION,

Petitioner,

against

CHRISTINE SMITH, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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August 1950.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RD-DR Corporation, petitioner, prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered in this case on July 14, 1950.

Opinions Below.

The opinion of the District Court (R. 29-32) is reported in 89 F. Supp. 596. The opinion of the Court of Appeals (R. 37-44) is unreported.

Jurisdiction of This Court.

The judgment of the Court of Appeals was entered on July 14, 1950 (R. 44). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

Questions Presented.

1. Whether the protection accorded by the United States Constitution to the press and speech is also applicable to motion pictures.

2. Whether the ordinance of the City of Atlanta, Georgia, which requires approval before a motion picture may be exhibited and authorizes the censors to withhold approval on the ground, among others, that exhibition of the picture will adversely affect the "peace, health, morals, and good order" of the City, is constitutional.

Ordinance Involved.

The pertinent provisions of the ordinance (R. 11-15) of the City of Atlanta, Georgia, are set forth in the Appendix. *infra,* pages 12-13.

Statement.

This is an action brought by petitioner and another to enjoin enforcement of an ordinance of the City of Atlanta, Georgia, purporting to subject motion pictures to censorship by requiring them to be approved and licensed by the defendants, the censor and the Board of Censors of the City. The facts alleged in the complaint (R. 2-9) and admitted by the answer (R. 22-26) may be summarized as follows:

During the year 1949, plaintiff RD-DR Corporation, a New York corporation (R. 2), produced a motion picture entitled "Lost Boundaries" (R. 5); plaintiff Film Classics Inc., also a New York Corporation (R. 2), engaged in distributing the picture by selling licenses to exhibit the motion picture in theatres (R. 5). "Lost Boundaries" is a serious drama about a negro family which lived for many years in a New Hampshire town where their neighbors believed them to be white (R. 6). The motion picture is not and is not claimed by defendants to be in any particular lewd, obscene, licentious or profane (R. 6).

Pursuant to the Atlanta ordinance, plaintiff Film Classics Inc. applied to the defendant censor for approval of the motion picture (R. 5-6). She disapproved it, and on appeal by Film Classics Inc., the defendant members of the Board of Censors upheld the censor's action and refused to issue a permit to exhibit the picture in Atlanta (R. 6). The refusal was solely on the ground that, in the opinion of defendant censors, the exhibition of the picture in Atlanta "will adversely affect the peace, morals and good order of said City" (R. 6, 16). In their answer, defendants allege that their decision was not arbitrary or capricious, but rather, in their considered and unbiased judgment, the exhibition of the picture would adversely affect the peace, morals and good order of the City because they believed it would create dissension and strife between the white and colored people and would be likely to cause disorders, disturbances and clashes between the races (R. 25-26).

If exhibition of "Lost Boundaries" had not been prohibited by the defendants, the plaintiffs could have licensed the exhibition of the picture to theaters within the police jurisdiction of the City of Atlanta (R. 5); the owners and operators of several such theaters are ready and willing to exhibit it and would do so but for the action of the defendants, the defiance of which would subject such owners and operators to criminal liability (R. 8, 25). The rentals which would have been derived by plaintiffs within the City, were it not for the action of defendants, exceed $3,000, exclusive of interest and costs (R. 7, 24).

The complaint alleged that the ordinance from which defendants derived their authority so to censor "Lost Boundaries" and prevent its exhibition in Atlanta is unconstitutional on its face in that it transgresses the due process clause of the Fourteenth Amendment (R. 4-5). Concurrently with their answer, defendants moved to dismiss the complaint (R. 26-7) and plaintiffs then moved for judgment on the pleadings (R. 28).

The District Court sustained the motion to dismiss the complaint on the ground that it states no cause of action (R. 32). While calling for a reexamination of the question

in the light of later decisions (R. 31), and while characterizing the action of defendants as attempting a "degree of thought control" (R. 32), the District Court nevertheless felt that it was bound by *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 U. S. 230, to hold that the constitutional guarantees afforded to the press and other media of communication do not extend to motion pictures.

In affirming the judgment of the District Court, the court below not only concluded that the *Mutual Film* case was decisive but declared that it was "in no doubt that the law was correctly laid down" in that case "and that the views there expressed ought not to be receded from" (R. 42). The court below condemned what it called the effort "to import the Bill of Rights into the Fourteenth Amendment" (R. 40). It described the plaintiffs' contentions as part of "the struggle to extend the Fourteenth Amendment as an instrument of nationalism by striking down all state regulatory power" (R. 39), and declared that apart from precedent, "a far more substantial reason than is here presented should be found for converting the Fourteenth Amendment into an instrument for the complete paralysis of the supervisory and regulatory powers of the states over the showing of motion pictures" (R. 43)[1].

Reasons for Granting The Writ.

The court below decided a Federal question of pervasive importance in the field of constitutional liberties in a way which is probably in conflict with applicable principles enunciated by this Court. Its decision is based on *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 U. S. 230—a case which has long since lost its vitality and should now be explicitly overruled.

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[1] As authorized by Rule 48 of this Court, this petition is filed on behalf of only one of the plaintiffs, RD-DR Corp., the producer of "Lost Boundaries". After the case was submitted to the Court of Appeals, petitioner terminated its distribution agreement with the other plaintiff, Film Classics Inc., and reacquired from that plaintiff the full right to license the exhibition of the motion picture.

1. Under the decision of the courts below, motion pictures remain the one medium of mass communication which is outside the protection of the First Amendment. By this case, petitioner seeks to correct this anomaly. The issue posed is probably the most important and comprehensive question which remains in respect of the field to which the First Amendment applies. For the issue here is the basic one of whether that Amendment applies to motion pictures at all.

The question thus involves not only a significant constitutional issue, but an issue affecting millions of Americans who view motion pictures every week. The economics of the motion picture industry are such that a motion picture must reach a mass audience throughout the country if it is to yield a return on the investment in it. Inevitably, the mere existence of such legislation as the Atlanta ordinance is a deterrent to the production of pictures on any controversial, or indeed on any thoughtful, subject. For as this Court recognized in *Thornhill* v. *Alabama*, 310 U. S. 88, 97, the "character of the evil inherent in a licensing system" lies in "the power of the licensor" which is "pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."

2. This case affords the Court with the opportunity to take the final and explicit step, clearly foreshadowed by its more recent decisions, which would bring motion pictures into their rightful place alongside other media of communication to which the protection of the First Amendment is extended. This Court has already clearly indicated that result, from which the court below turned.

In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166, this Court stated:

> "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment".

In *Kovacs* v. *Cooper,* 336 U. S. 77, the concurring opinions of Mr. Justices Frankfurter and Jackson and the dissenting opinion of Mr. Justice Black all specifically mentioned motion pictures as a medium of "mass communications". Mr. Justice Black, dissenting, wrote (336 U. S. at 102):

> "Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems".

Since the first declaration, in *Gitlow* v. *New York,* 268 U. S. 652, 666, that the due process clause of the Fourteenth Amendment embraces freedom of speech and the press, this Court has not permitted a single exception to the means of communication that are within the constitutional protection. It has held that such protection extends to such varying means of expression as the display of a flag, *Stromberg* v. *California,* 283 U. S. 359; the flag salute, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; picketing, *Thornhill* v. *Alabama,* 310 U. S. 88; the distribution of leaflets in the streets, *Lovell* v. *City of Griffin,* 303 U. S. 444, *Schneider* v. *State,* 308 U. S. 147; house to house canvassing for the sale of publications, *Martin* v. *Struthers,* 319 U. S. 141; the distribution of crime magazines in which this Court could see "nothing of any value to society," *Winters* v. *New York,* 333 U. S. 507, 510; the playing of phonograph records, *Cantwell* v. *Connecticut,* 310 U. S. 296; and the use of sound amplifiers, *Saia* v. *New York,* 334 U. S. 558, *Kovacs* v. *Cooper,* 336 U. S. 77.

The role of the motion picture as an informational medium like the press has been recognized not only by this Court, but also by the legislative and executive branches of the federal government. The Act establishing the United States Information Service directs the Secretary of State, in carrying out its program, "to utilize, to the maximum extent practicable, the services and facilities of private agencies, including existing American press, publishing, radio, motion picture and other agencies" (22 U. S. C.

Section 1437). One of the resolutions adopted by the Inter-American Conference at Chapultepec linked "the press, motion picture and radio" in calling for early abandonment of wartime censorship. (Resolution XXVII in First Act of the Inter-American Conference on Problems of War and Peace—Mexico City, February-March 1945, Pan-American Union 1945, page 69). A provision of the Economic Cooperation Act (63 Stat. 51; 22 U. S. C. Section 1509(b)(3)) authorizing guarantees of private investments in "informational media" has been defined by the administrator to include motion pictures, as well as newspapers, magazines and books, among informational media. (ECA Reg. 4, as amended, 14 Fed. Reg. 3916.)

This general recognition of the vital role of motion pictures as a medium of communication is reflected in the *Paramount* case, *supra;* it is completely irreconcilable with the view expressed by the court below that motion pictures are "exhibitions and spectacles" which are not worthy of the protection of the First Amendment.

3. The decisions of this Court establish that the Fourteenth Amendment requires "the application to the States of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government" (*Bridges* v. *California*, 314 U. S. 252, 268). See *Near* v. *Minnesota*, 283 U. S. 697, 707; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *De Jonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88; *Winters* v. *New York*, 333 U. S. 507. The court below plainly repudiated that principle.

That court found in the opinions in *Adamson* v. *California*, 332 U. S. 46 and *Wolf* v. *Colorado*, 338 U. S. 25, and in the concurring opinion of Mr. Justice Frankfurter in *Kovacs* v. *Cooper*, 336 U. S. 77, ground for the conclusion that this Court will now affirm the holding in the *Mutual Film Corporation* case. It is respectfully submitted that the court below misapplied those opinions of this Court. The *Adamson* and *Wolf* cases deal with the perplexing question whether certain provisions of the Bill of Rights

other than those embodied in the First Amendment are made applicable to the States; in no way do they limit the rule of the *Near* case and the many which have followed it, by which the states are forbidden to trespass upon rights protected by the First Amendment. That the concurring opinion of Mr. Justice Frankfurter in *Kovacs* v. *Cooper, supra,* affords no support to the decision below is shown by the fact that that opinion impliedly condemned the type of censorship here involved. Mr. Justice Frankfurter wrote (336 U. S. at 97):

> "*So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace,* it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection." (Emphasis added).

The Atlanta ordinance undertakes to do exactly what Mr. Justice Frankfurter here implied that a legislature may not do,—to prescribe what ideas may be expressed upon the screen and what may not be.

4. Whether attention is focused on the First Amendment or the Fourteenth Amendment, many decisions of this Court establish that, once motion pictures are recognized as a medium of communication entitled to the constitutional freedoms, the Atlanta ordinance must be held to be invalid on its face.

It is invalid as improperly imposing a prior restraint. *Near* v. *Minnesota,* 283 U. S. 697; *Lovell* v. *City of Griffin,* 303 U. S. 444; *Hague* v. *CIO,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Largent* v. *Texas,* 318 U. S. 418; *Thomas* v. *Collins,* 323 U. S. 516. The Atlanta ordinance is also invalid because the standards which it embodies are so broad that, whatever the sanction, whether a prior restraint or subsequent punishment, it embraces constitutionally protected expression. *De Jonge* v. *Oregon,* 299 U. S. 353; *Thornhill* v. *Alabama,* 310 U. S. 88; *Bridges* v. *California,* 314 U. S. 252;

Winters v. *New York,* 333 U. S. 507; *Terminiello* v. *Chicago,* 337 U. S. 1.

Indeed, the ground on which the Atlanta censor may ban, and here has banned, a motion picture—that of adverse effect upon "peace" and "good order"—is indistinguishable from that which this Court has held insufficient as a justification for the licensing of street meetings (*Hague* v. *CIO,* 307 U. S. 496). The Atlanta ordinance shows on its face that what the city is attempting to do is "to protect the public against false doctrine" and thus to defy "the very purpose of the First Amendment", which "is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion" (*Thomas* v. *Collins,* 323 U. S. 516, concurring opinion of Mr. Justice Jackson at 545).

In sum, it is plain that what the Atlanta ordinance permits defendants to do in respect of motion pictures, and what defendants have done pursuant to such authorization, is precisely what has been condemned by this Court in respect of other media of expression.

5. The constitutional issue is presented by this case in a posture peculiarly free of encumbering procedural or jurisdictional issues. Jurisdiction is based both on the federal question and on diversity of citizenship. It is clear both that petitioner has standing to raise the question[2] and that no reason exists for the Federal judiciary's withholding its hand in the matter.

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[2] The termination of the contract between the two plaintiffs (see page 4, footnote, *supra*) in no way affects the present controversy. Obviously the admitted facts remain that exhibitors in Atlanta are ready and willing to exhibit the motion picture and that the refusal of the defendants to license it has resulted in the loss of film rentals exceeding $3,000. This petitioner now has all the rights in the motion picture which, at the time of the filing of the complaint and the submission of the case to the courts below, were held jointly by petitioner and Film Classics Inc. The grievance asserted in the complaint is now the grievance of this petitioner alone. The injury complained of is now being suffered by this petitioner alone.

Although the Atlanta ordinance imposes penalties only upon those who exhibit unapproved motion pictures, the economic pinch is felt by the owners of the pictures which cannot be shown in the City, not by the exhibitors whose theaters will be operated with one picture or another. Under these circumstances, plaintiff's standing to invoke federal equitable jurisdiction is fully sustained by the decisions of this Court in *Truax* v. *Raich,* 239 U. S. 33; *Terrace* v. *Thompson,* 263 U. S. 197; *Pierce* v. *Society of Sisters,* 268 U. S. 510; and *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407.

The propriety of the exercise of federal equity jurisdiction to determine the important constitutional question presented is upheld by many decisions of this Court. See, *e.g., Packard* v. *Banton,* 264 U. S. 140, 1943; *Tyson* v. *Banton,* 273 U. S. 418, 428; *Grosjean* v. *American Press Co.,* 297 U. S. 233; *Parker* v. *Brown,* 317 U. S. 341, 349-50; *Toomer* v. *Witsell,* 334 U. S. 385, 391-2.

Here, as in *Toomer* v. *Witsell, supra,* "there is neither need for interpretation * * * nor any other special circumstances requiring the federal court to stay action pending proceedings in the State courts." The ordinance was enacted pursuant to specific statutory authority, and the action of the respondents follows the exact wording of the ordinance. Thus, in sharp contrast to *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, there is not in this case a question involving local law or interpretation the resolution of which might dissipate or circumscribe the constitutional issue—even if it were assumed, contrary to the fact, that petitioner had a means of ingress to the state courts.

Indeed, there is no plain remedy which petitioner might have invoked in a state court. Obviously, neither of the plaintiffs could have tested the validity of the ordinance by taking action which would have precipitated criminal prosecution against them. For the prohibitions of the ordinance apply only to exhibition, and not to production or distribution. Nor did petitioner or the other plaintiff below have a clear remedy in the form of injunctive relief

in the Georgia courts. *Cf. City of Atlanta* v. *Universal Film Exchanges,* 201 Ga. 463, 39 S. E. (2d) 882. In that case, the author of the opinion frankly admitted that after examining the Georgia decisions on the exercise of equity jurisdiction over administration of the criminal law, he was "unable to reconcile some of the decisions with others". The confusion in the Georgia law on this subject was conceded by the defendants' attorney upon the argument in the District Court. While he suggested the possibility that there might be review by certiorari, that remedy is limited to review over the exercise of judicial power (Georgia Code, Sec. 19-101), and the Supreme Court of Georgia has held that it is available only where the law grants a right "to demand a trial in accordance with judicial procedure". *South View Cemetery Association* v. *Hailey,* 199 Ga. 478, 481, 34 S. E. (2d) 863, 866. It is plain that the Atlanta ordinance vests no such judicial power in the Board of Censors.

It is apparent that only by invoking the equity jurisdiction of the District Court could the plaintiffs secure a plain, adequate and complete remedy against enforcement of the ordinance. The courts below properly assumed that the District Court had jurisdiction and should exercise it to determine on the merits the constitutional issue that is presented. The opportunity to determine the question which the District Court said "appears to need re-examination" (R. 31) is squarely presented to this Court.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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AMBROSE DOSKOW,
Attorneys for Petitioner.

August 1950.

APPENDIX.

Excerpts from

ORDINANCE GOVERNING THE EXHIBIT OF MOTION PICTURES IN ATLANTA.

* * * * * *

Section 2. It shall be unlawful for any person to exhibit or cause to be exhibited within the City of Atlanta or within any other territory over which the City exercises Police jurisdiction, any picture or moving picture unless the same has been approved by the Censor or the Board of Censors as herein provided. It is declared to be the purpose of this ordinance to prevent the display of obscene or licentious pictures or other pictures that may adversely affect the peace, health, morals, and good order of said City.

Section 3. There is hereby created in the Department of Carnegie Library the position of Motion Picture Censor. * * *

* * * * * *

Section 4. The Carnegie Library Board is hereby declared to be the Board of Censors and the members thereof are hereby invested with all the power and authority in connection with the regulation of moving picture shows set forth in the Charter of the City, same being Section 5-305, Code, City of Atlanta, 1942. They are specifically given the power to censor, supervise and regulate all public exhibitions, plays, motion pictures, performances, pantomines, or other exhibitions within the City of Atlanta where charges are made for admissions to such. Said Board shall also have the power to prohibit any public exhibition, play, motion picture, performance, pantomine, or other representation which shall be immoral, lewd, obscene, licentious in character, or profane, and shall have the power to review

any decision of the censor in connection with motion pictures.

* * * * * *

Section 6. It shall be the duty of the Censor to examine and view such films or pictures as any person may offer for display in the City of Atlanta, and if the same are obscene, lewd, licentious, profane, or will in his opinion adversely affect the peace, health, morals and good order of the City, he thereupon shall order a deletion of such scene or scenes or dialogue, and upon compliance with said order the film or picture may be presented. The Censor shall transmit to the Board of Censors a monthly detailed report of his actions.

Section 7. Any person aggrieved by any action of the Censor may within ten days thereof take an appeal to the Board of Censors, which Board shall promptly review the decision of the Censor, and shall confirm, modify or reverse such action. Any decision reached by said Board on appeal shall be final except that it may be subject to review by the Courts under the applicable statutory law.

* * * * * *

Section 11. Any person convicted in the Recorders Court for the violation of any of the provisions, shall be fined not to exceed $500.00 or to work on the public works not to exceed 30 days, either or both, in the discretion of the Recorder. Each day shall constitute a separate offense.

* * * * * *